MOTION FILED
MAY 12 1982

No. 81-1891

IN THE

Supreme Court of the United States

October Term, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

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Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO: The Supreme Court of the United States.

American Insurance Association respectfully moves for an order granting leave to file an amicus curiae brief in the above-entitled case pursuant to Rule 36 of the Revised Rules of this Court. Consents of the attorneys for petitioners and the Federal respondent have been received. Consent of the respondent Hilyer has been refused.

The movant, American Insurance Association (AIA), is an unincorporated trade association of 150 property and casualty insurers. Its members represent a large percentage

of the property and casualty industry, particularly in the area of workers' compensation. The most recent figures available demonstrate that in 1980, AIA member companies wrote over $6 billion in direct workers' compensation premiums nationwide, including Longshoremen's and Harbor Workers' Compensation Act (Longshore) coverage, accounting for nearly 43% of the market for this type of insurance. While specific figures are not available, it is estimated that approximately the same percentage of Longshore coverage is written by AIA companies.

The AIA and its member companies are deeply concerned that the ruling of the District of Columbia Circuit Court of Appeals in *Hilyer* will place enormous stress upon an already over-burdened workers' compensation system.

It is the view of the AIA and its members that the practical effect of the *Hilyer* holding will be to defeat the primary purpose of the Act which is to provide a swift and efficient remedy to injured employees. The AIA, as amicus curiae, seeks to assist the Court by presenting a discussion of the adverse impact of the decision on the efficiency of the Longshore system in both the public and private sectors.

Petitioners and respondents are primarily expected to emphasize the merits of the Court of Appeals' decision vis-a-vis the facts of the instant case and their clients' respective interests, while discussing only peripherally the administrative implications of the court's ruling with even less attention being devoted to the economic and social ramifications. These issues, of utmost importance to the business community and insurance industry, will not adequately be presented by the parties, and it is for this reason

that the AIA moves this Court for leave to file the attached amicus curiae brief.

The attached amicus curiae brief of the American Insurance Association discusses the scope of the *Hilyer* decision, the purpose of the Longshore Act, the manner in which that purpose is defeated and the impact on all links in the compensation chain.

For the foregoing reasons, this motion for leave to file a brief as amicus curiae should be granted.

Dated: May 12, 1982

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BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Court of Appeals' decision, if left unreviewed, will result in a fundamental change in administration of the Longshoremen's and Harbor Workers' Compensation Act. The Act was intended by Congress to provide prompt and definite compensation benefits to injured workers in a legislative compromise between the interests of employers and Longshore workers. The Court of Appeals' introduc-

tion of the tort-like concept of "value received" by an injured worker as a basis for calculating his average weekly wages, and hence his compensation benefit rate, creates substantial factual uncertainty which Congress sought to avoid as it attempted swift and certain delivery of weekly disability benefits to injured workers.

Since the concept of average weekly wages is the starting point to the calculation of basic weekly benefits in every compensation case, the Court of Appeals' decision will affect all claims arising under the Act. The Court of Appeals' introduction of significant uncertainty into this base figure will have immediate and widespread consequences which will only result in delaying benefits and spawning additional litigation. The new approach to defining average weekly wages, which is contrary to 55 years of consistent administrative interpretation of the Act, will also cause an enormous administrative burden on the Department of Labor, and will result in the imposition of substantial unexpected costs to the Longshore industry and its carriers. For these reasons prompt review of the decision below and a reversal thereof are required.

ARGUMENT

I. SCOPE OF THE DISTRICT OF COLUMBIA CIRCUIT'S OPINION BELOW

The decision below, if left unreviewed, will have an immediate and widespread impact upon most claims presently being adjudicated under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), and require substantial retroactive adjustment of countless past claims which are now lying dormant. Although facially the Court of Appeals' construction of average weekly wages in the opinion below may appear to

be relatively tangential to the prime focus of the Act and of minor import, it actually effects a fundamental mutation in the administration of the Act.

As noted by the Court of Appeals, its decision in *Hilyer* addressed an issue of first impression at the Court of Appeals level. Petition Appendix C, p. 8a. The court held that the value of employer contributions to a Taft Hartley employee benefit trust fund must be included in determination of an employee's average weekly wages as computed under § 10 of the Act. Petition Appendix C, pp. 9a, 13a - 14a; 29 U.S.C. § 186(c)(5); 33 U.S.C. § 910.

The court held that one reasonable method of valuing the benefit to the employee of participation in the trust fund is to include the amount of the employer's contribution to the general fund in his average weekly wage calculation. Petition Appendix C, pp. 13a - 14a. Although the issue arose in conjunction with a death claim, the statutory provisions pertaining to calculation of average weekly wages do not differentiate between death claims and disability claims, and the court's interpretation would have universal applicability.

The statutory provisions pertaining to determination of average weekly wages were enacted in March, 1927, and have continued in their original form without material amendment.[1] 33 U.S.C. §§ 902(13), 910(a)-(d). Prior to the Court of Appeals' decision below, no reported decision

[1] When substantial amendments were made to the Longshore Act in 1972, Congress did not even discuss or address changing the original and administratively well settled concept of average weekly wages, although one of the major focuses of the amendments concerned the extent to which maximum and minimum benefits were to be increased. *See Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979). Significant discussion centered around comparative analyses of average weekly wage *levels* only, and, in that context, fringe benefits were either specifically factored out or the discussion of wages referred to tradi-

under the Act included fringe benefit contributions in an average weekly wage determination. When previously confronted with the issue, the Benefits Review Board uniformly rejected attempts to include fringe benefit contributions. *Waters v. Farmers Export Co.*, 14 BRBS 102, (1981), (*appeal pending* in 5th Cir., Nos. 81-4258 and 81-4273); *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), (*appeal pending* in 9th Cir., No. 79-7094); *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977); *Hilyer v. Morrison Knudsen Construction Co.*, 6 BRBS 754 (1977); *Collins v. Todd Shipyards Corp.*, 5 BRBS 334 (1977).

The Department of Labor, Office of Workers' Compensation Programs ("OWCP"), the Agency charged with administration of the Act, has maintained a consistent administrative interpretation of the Act excluding fringe benefits from average weekly wages, and has declined thus far to implement *Hilyer* pending Supreme Court review of the decision.[2] *See*, U.S. Department of Labor, LS/HW Program Memorandum No. 32 June 17, 1968. (Appendix A hereto) Examples of the implementation of average weekly wage calculations excluding fringe benefit contributions are strewn throughout reported case law, giving concrete form to the historical administrative interpretation. The Court of Appeals decision below necessarily

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tional concepts of gross earnings. *E.g.*, Legislative History of Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Committee Print Compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor (1972), pp 37-38, 62, 68, 98-111, 165, 501-506, 690-694; Legislative History of Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Committee Print Compiled for the House Committee on Education and Labor by the Select Subcommittee on Labor (1972), at 53, 63, 68, 73, 208-213, 266-270.

[2]The Department of Labor has argued in the 9th Circuit that the decision in *Hilyer* is wrong and should not be followed. *Freer v. Duncanson-Harrelson*, No. 79-7094.

would require a 180 degree reversal of 55 years of consistent application of the Act.

Average weekly wages must be determined in every workers' compensation case in which disability or death benefits are payable. The sole purpose for calculating average weekly wages under the Act is to set a statutorily defined figure from which all compensation benefits are to be calculated. 33 U.S.C. § 910. Disability benefits for temporary total or permanent total disability are calculated as 66-2/3 percent of average weekly wages. 33 U.S.C. § 908(a) and (b). Disability benefits for total or partial loss or loss of use of one or more scheduled members are statutorily defined to be 66-2/3 percent of average weekly wages payable for the number of weeks set forth in the listed schedule. 33 U.S.C. §§ 908(c)(1)-(19).

Disability benefits for permanent partial disabilities, other than those listed in the schedule, and benefits for periods of temporary partial disability, are calculated at the rate of 66-2/3 percent of the difference between a claimant's average weekly wages and his post-injury wage earning capacity. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980); 33 U.S.C. §§ 908(c)(21) and (e). The calculation of wage earning capacity for non-scheduled partial disabilities is determined either by an individual's actual post-injury earnings or by fixing a reasonable wage earning capacity based upon the facts of the case. 33 U.S.C. § 908(b); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649, (1979). In death cases, survivors' entitlement to compensation benefits range from 20 percent to 66-2/3 percent of average weekly wages, depending upon the nature of the survivor's dependency. 33 U.S.C. §§ 909(b), (c), (d).

Parameters are set by the Act defining maximum and minimum compensation rates, determined with reference

to the national average weekly wage, established annually by the Secretary of Labor. 33 U.S.C. § 906(b). Under the statute, disability benefits may not exceed 200% of national average weekly wages, and may not be less than 50% of national average weekly wages or a claimant's average weekly wages, whichever is less. 33 U.S.C. § 906(b). Death benefits may not be less than the national average weekly wage or the decedent's average weekly wage, whichever is less. *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979). A claimant receiving permanent total or death benefits is entitled to an annual benefit adjustment determined by the percentage increase in the national average weekly wage. 33 U.S.C. §§ 910(f)-(h). The national average weekly wage historically calculated by the Secretary of Labor has *never* included fringe benefit contributions.

With respect to prospective claims for disability or death benefits, the decision below is significant in *all* cases because in all cases average weekly wages must be determined as a basis for compensation benefits. Congress has recognized a massive increase in the number and significance of employee benefit plans, 29 U.S.C. § 1001, and reacted by enacting a detailed regulatory scheme. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* The United States Chamber of Commerce has calculated that *voluntary* fringe benefit payments in 1980, exclusive of statutorily required payments, were approximately 28% of payroll. Chamber of Commerce of the United States, *Employee Benefits, 1980*, p. 8 (1981) (1615 H Street, N.W., Washington, D.C. 20062).

Due to the pervasiveness of fringe benefit contributions throughout the work world, the decision below would significantly change the compensation rate calculated

from average weekly wages in many cases. In all cases of temporary partial or non-scheduled permanent partial disability, a fringe benefit calculation would also be necessary in conjunction with residual wage earning capacity. In such cases in would be necessary to investigate the relative "value" of fringe benefits before and after the injury to address loss in wage earning capacity. In all cases at the maximum or minimum rate, revision of the national average weekly wage to include all fringe benefits would be required and would alter the compensation benefits. The change in national average weekly wages would have the secondary effect of revising the annual adjustment for persons receiving permanent total disability benefits or death benefits. Inclusion of fringe benefits in average weekly wages would therefore be felt on a practical basis at not just one, but frequently two or more stages in workers' compensation cases.

The effect of the decision below upon prior compensation cases is, however, potentially more profound. Since the statutory interpretation defined a term which has been in the Act since its inception, there can be no doubt that the District of Columbia Circuit viewed its decision as having full retroactive effect. Under the terms of the Act, an award may be modified at any time during which compensation benefits are being paid, or up to one year after the last payment of compensation. 33 U.S.C. § 922. If no prior order has been entered, then an order revising benefits voluntarily paid may be entered *at any time* provided a timely claim was filed. *Intercounty Construction Co. v. Walter,* 422 U.S. 1 (1975). Consequently, the only past claims under the Act not subject to modification are those disposed of by award in which the last payment was made more than one year ago. The issues which are subject to reopening in these cases include average weekly

wage, residual wage earning capacity, maximum or minimum benefits and annual adjustments.

To bring national average weekly wages in line with the Court of Appeals decision below would require either retroactive recalculation of national average weekly wages by the Secretary of Labor, or a mammoth one-year adjustment to introduce fringe benefits and substantially alter the annual modification. 33 U.S.C. § 906(b)(3), 910 (f)-(h). The opinion below therefore not only inserts itself into numerous issues in pending and future cases but also may require re-activation of numerous dormant or uncontested cases for adjustment on one or more issues.

The Court of Appeals' holding in *Hilyer* expressly requires only that fringe benefit contributions of employers into Taft Hartley trust funds be included in calculation of average weekly wages. This, in itself, is serious enough. The most persuasive interpretation of *Hilyer*, and perforce its practical impact upon administrative fact finders, however, is that *Hilyer* mandates inclusion of any indirect perquisite in the average weekly wage calculation. Applied in that manner, the impact of *Hilyer* upon both present and past cases would be even more significant, and the several issues of average weekly wages, residual wage earning capacity, maximum and minimum compensation rates and annual adjustments would have to be re-examined in light of such incidental benefits as employer-provided group health policies, employer-provided group term life insurance, medical reimbursement plans, corporate profit-sharing and pension plans, continuing professional educational programs, travel allowance to professional conferences or meetings, unemployment compensation insurance, individual life insurance and related matters. These incidental benefits would arguably also extend to *de minimis* items, such as the value of company

picnics, social events, and the office coffee pot. There is incentive in the Act to pursue these items through the litigation process since attorneys' fees are assessed against the employer and carrier if counsel is successful in obtaining any additional benefits for the worker beyond what has been voluntarily paid. 33 U.S.C § 928(a).

Applying *Hilyer* logically and directly would even yield the more absurd result that average weekly wages must include employer premium payments for workers' compensation insurance, since this is clearly a benefit to employees, for it protects them against medical expenses and loss of wages for employment injuries, even if the injuries are solely their own fault. As noted by petitioners, Longshore compensation premiums in New York are already 86% of payroll, and would rise *above* payroll if *Hilyer* is accepted. Petition for Certiorari, p. 7; *See also, Wall Street Journal,* May 21, 1981, p. 26. The spiraling effect of including these premiums themselves in wage calculation would be substantial, and the end result would be that an injured employee might receive compensation benefits tax free in an amount substantially in excess of his actual pre-injury reportable *gross* earnings.

To apply the Court of Appeals' standard of attempting to determine the ethereal *value* to a claimant of an incidental benefit requires time-consuming analyses which are clearly repugnant to the self-executing purpose of the Act. Actual value to an employee can only be measured after taking into account such reductions as state and federal income taxes, social security, plus other payroll deductions. Net value to an employee of his employment would likewise have to take into account unreimbursed employee costs such as transportation to work, parking, tools, equipment, uniforms, etc.

Since factual investigation of these elusive principles could result in grinding the compensation system to a halt, amicus respectfully suggests that the concept of "value received by employees" used by the Court of Appeals is not the appropriate measuring standard for determining average weekly wages.

II. THE PURPOSE OF THE LHWCA IS TO PROVIDE A SWIFT AND MECHANICAL REMEDY

The LHWCA is designed to be a swift and mechanical remedy which attaches a specific dollar figure to an employee's average weekly wage, without the need for litigation or protracted negotiations. This Court, in *Norton v. Warner Co.*, 321 U.S. 565, 568 (1944), noted that the "design of the Act" was one of "encouraging prompt and expeditious adjudication of claims arising under it." In *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 476 (1947), in addressing the District of Columbia extension, the Court reiterated this principle:

> "A prime purpose of the Act is to provide residents of the District of Columbia with a *practical and expeditious remedy* for their industrial accidents and to place on District of Columbia employers a *limited and determinate liability.*" (emphasis added)

See also, Harrington v. Moss, 407 A.2d 658 (D.C. 1979). The emphasis in construing the Act should therefore be on preserving the nature of the remedy as one which affords a swift and readily determinable application.

In order to fashion a statute which would be acceptable to employers and would provide the speedy remedy desired, it was necessary to arrive at a compromise between the competing rights of employers and disabled

employees. This historical fact was recognized by this Court in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282 n. 24 (1980) (*"PEPCO"*):

> 'Workmen's compensation acts are in the nature of a compromise or quid pro quo between employer and employee. . . . In return for a fixed schedule of payments and a fixed amount in the event of the worker's death, employers are made certain that irrespective of their fault, liability to an injured workman is limited under workmen's compensation. Employees, on the other hand, ordinarily give up the right of suit for damages for personal injuries against employers in return for the certainty of compensation payments as recompense for those injuries.' 1 M. Norris, *The Law of Maritime Personal Injuries*, § 55, p. 102 (3d ed 1975)."

In exchange for the employer's waiver of tort defenses the employee waived his rights to seek full tort damages. Promptness in the receipt of weekly benefits and certainty of the remedy were the consideration for the employee's acceptance of a smaller recovery.

The proper interpretation of the Act, therefore, should be to effectuate the statutorily enacted compromise and not to attempt, as does the *Hilyer* decision, to restore to the employee all "values received" from his employer prior to his injury. Petition Appendix, p. 8a. This Court stated this principle clearly in *PEPCO, supra,* at p. 281:

> "While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits on

> potential liability than would have been applicable in common-law tort actions for damages. None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only two-thirds of the actual loss of earnings."

This principle is also recognized by Professor Larson in his authoritative treatise:

> "A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others." 1 Larson, *Workmen's Compensation Law*, § 2.50, p. 11.

The LHWCA satisfied the purpose of compensation and recognized the importance of the compromise by establishing a readily determinable and mechanical formula for the calculation of benefits, based upon two-thirds of the employee's average weekly wage. 33 U.S.C. §§ 908, 910. Prior to *Hilyer*, the word "wage" was construed as intended – as dollar earnings – and could be calculated with simple reference to pay-stubs or W-2 forms. Given that interpretation, the compensation system functioned as a smoothly running machine, by swiftly, certainly, and correctly calculating and distributing weekly benefits to deserving injured workers.

III. HILYER DEFEATS THE PURPOSE OF THE LHWCA

The primary effect of the *Hilyer* case is to create uncertainty in an area where a simple, determinate and easily calculable formula is desired. As discussed in Section I,

supra, it is not established by *Hilyer* what types of benefits are now to be injected into the average weekly wage computation. In addition to questions concerning the type of benefits to be included, uncertainty is also created as to how the value of the benefits is to be determined. Although *Hilyer* says that it is "reasonable to measure [the] value by the amount of the employer's contributions", Petition Appendix, p. 14(a), it nowhere says that this is the *only* permissible method of calculation. It is easy to envision the myriad of imaginative valuation methods which will be urged by the litigants if *Hilyer*'s invitation is allowed to stand.

The *Hilyer* decision thus creates countless legal issues concerning what benefits are included in average weekly wage and countless factual issues as to how these benefits are to be valued. While the legal issues may ultimately be resolved through a long series of appellate cases, the factual issues will become a permanent fixture. The uncertainty thus engendered will invade every step in the administration of the LHWCA and destroy the Act's ability to provide a quick and efficient remedy to an injured worker in keeping with its "design" and "prime purpose." *Norton, supra*, p. 568; *Cardillo, supra*, p. 476.

In the vast majority of cases, compensation is voluntarily and automatically paid to the claimant, without an award or any litigation. *See* 33 U.S.C. § 914(a). Adversary action arises and the adjudicatory process is activated only when a claim is initially controverted or thereafter when voluntary compensation benefits are reduced or terminated. *See, e.g., Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980).

The first step in the adjudicatory process is the informal conference before a deputy commissioner. 33 U.S.C. § 919; 20 C.F.R. § 702.311 *et seq.* In 1981, while 56,000

lost-time cases were closed (excluding cases under the District of Columbia extension), only 8,300 informal conferences were held. United States Department of Labor, *1983 Budget Justifications of Appropriations Estimates for the Committee on Appropriations* (January 1982) ("*1983 Budget Justification*"), p. ESA-33. Thus, absent the injection of *Hilyer,* more than 85% of all lost-time claims were voluntarily and informally resolved without advancing to even this preliminary stage of litigation.

Given the unsettled legal and factual questions spawned by the *Hilyer* decision, it is naive to suppose that employers and carriers will, as in the past, amicably stipulate to the average weekly wage and forego the right to present evidence on valuation when a claimant is injecting fringe benefits into his wage calculation. It is equally naive to think that claimants' attorneys, with the incentive of employer-subsidized fees, 33 U.S.C. § 928(a), will accept tendered payments which include less than all "benefits", using the most expansive definition of the word. With *Hilyer* on the books, a greater percentage of cases will almost certainly proceed to the informal conference stage and beyond.

The informal conference, however, is not a dispositive proceeding since the end product is not a ruling, but merely a recommendation of the claims examiner or deputy commissioner. 20 C.F.R. § 702.316. Either party may reject the recommendation. The case then proceeds to the Office of the Chief Administrative Law Judge to be set for a formal hearing. It is at this level that formal fact-finding is held, and at which the parties may present their respective factual contentions relating to valuation of fringe benefits. In 1981, a total of 5,538 cases went before the nineteen Administrative Law Judges ("ALJ"s). *1983 Budget Justification,* p. DM-38. Of these, only 2,968 were disposed of. *Id.* Any major increase in the workload, such

as the opening of the floodgate activated by the *Hilyer* decision, will drown the ALJs beneath an impossible sea of cases. It is likely that the bulk of factual issues concerning average weekly wage, now avoided by the certainty of the Act, will require ALJ action, increasing the workload geometrically.

There is no reason for the losing party to stop at the ALJ's office, however, for each ALJ's decision is subject to review by the Benefits Review Board. 33 U.S.C. § 921. Every case raising a new type of benefit or combination of benefits, and a new method of valuation, will be a case of first impression. The party adversely affected will therefore certainly seek review by the Board. The Board, which in 1981 had a docket of only 1,002 cases, *1983 Budget Justification,* p. DM-42, will succumb to a crush of cases similar to that which will have buried the ALJs.[3]

The prospects for the OWCP are thus bleak if *Hilyer* is allowed to stand. An already overburdened and backlogged system will literally grind to a halt under the weight of *Hilyer*-inspired litigation. *See, e.g., Comptroller General's Report* at pp. 30-33. The 1981 figures are based upon 61,000 lost-time injuries covered by the Act (excluding the District of Columbia). The Department of Labor projects that there will be 67,000 such injuries in 1982 and 73,000 in 1983. *1983 Budget Justification*, p. ESA-33. These estimates do not include cases which will be reopened or reactivated under 33 U.S.C. § 922.

Ironically, however, the party damaged the most by *Hilyer* is the injured worker. In attempting to increase the worker's recovery by reinstating tort-style damages, the

[3]The head of the Board independently estimated that 96% of all claims are resolved before reaching the ALJs. He estimates that 1% reach the Board and 0.1% reach the U.S. Court of Appeals. Report by the Comptroller General of the United States, "Longshoremen's and Harbor Workers' Compensation Act Needs Amending", April 1, 1982 (*"Comptroller General's Report"*), p. 5.

Court of Appeals has inadvertently but undeniably reinstated the tort-style timetable. Instead of the immediate benefits the claimant bargained for and obtained through the compromise embodied in the Act, a slow litigation process through an overburdened system will be necessary, during which time the claimant may well have no means of support. The Act was designed to avoid just such a result:

> ". . .contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged." *Norton* v. *Warner, supra*, 321 U.S. at 569.

Rather than discouraging contests and delays, the *Hilyer* case invites them by fostering uncertainty in the benefit calculation formula. The once easy computation of average weekly wages will become the subject of floods of litigation, the impact of which will be to cripple the administrative process and to defeat the very purpose for which the Act was created.

IV. Impact on Industry

The impact of implementation of the Court of Appeals' holding in *Hilyer* upon industry would be of a different, but nonetheless substantial, nature. Even before *Hilyer*, the LHWCA was notorious for its high costs. For example, as of January 1, 1978, for various types of business, District of Columbia workers' compensation insurance premium rates under the D.C. Extension of the Act varied from 127% to 431% of their Maryland and Virginia counterparts. From 1973 to 1979, workers' compensation insurance premiums in the District of Columbia increased in excess of 600%. 126 Cong. Rec., February 7, 1980. (H 745); *see also, Comptroller General's Report,* pp. 8-19

(Longshore insurance costly and difficult to obtain). Based upon the the U.S. Chamber of Commerce survey indicating that fringe benefits constitute an average of 28% of payroll, *Hilyer* would have the immediate effect of increasing workers' compensation premiums at least by that amount, since premium calculations are based directly on payroll.

With respect to most Longshore trades, where fringe benefits exceed 50% of wages, the resounding effect on premiums would be more profound. If *Hilyer* is applied more broadly than just to Taft Hartley trust funds, the effect would be more substantial still. The administrative costs to insurers in handling the new factual issues posed would further increase premiums, as would administrative and legal costs incurred for retroactively adjusting prior claims.

Substantially increased premiums will likely have the two-fold effect of driving employers from the trade and making it impossible for those who stay to obtain voluntary insurance. For example, in testimony before the District of Columbia's City Council's Committee on Housing and Economic Development, exploring the need for a new Workers' Compensation Act in the District of Columbia, the Executive Director of the Mayor's Office of Business and Economic Development concluded that from 1970 to 1976, the District of Columbia lost 108 firms and approximately 15,000 jobs, an estimated loss of $180 million in payroll per year, due in substantial part to already unnecessarily high premiums. 126 Cong. Rec., February 7, 1980 (H 745); Report, Committee on Housing and Economic Development on Bill 3-106, The District of Columbia Workers' Compensation Act of 1979, January 8, 1980, pp. 3, 4. ("Committee Report"). Difficulties ex-

perienced by private employers in the District of Columbia in obtaining voluntary workers' compensation insurance from individual insurance companies were evident from statistics of the District of Columbia Department of Insurance indicating that in 1975, 568 private employers were insured by the assigned risk pool, whereas by 1978, the number had grown to 24,000. Committee Report, *supra*, p. 5.

With respect to those few employers who are subject to retroactive premium adjustment based upon payroll audit, Hilyer would cause a retroactive surcharge in premiums for those incidental benefits, costs for which employers have not budgeted in their business planning. Insurance carriers will likely suffer the substantial brunt of retroactive adjustment in average weekly wage, however, as the bulk of past premiums are not subject to chargeback. Carriers will therefore be required to pay additional compensation benefits based upon a payroll base far in excess of that for which premiums were collected.

The complex system of setting reserves from which to pay claims is already more significant in workers' compensation insurance than in other areas due to the significantly longer payout period on workers' compensation cases as opposed to the single payment practice in life and casualty insurance. Reserve requirements will have to be adjusted retroactively to account for *Hilyer*, and substantial assets will have to be set aside to comply with various statutory reserve requirements. *E.g.*, D.C. Code § 35-1530; *See, e.g.*, R. Strain, *Property - Liability Insurance Accounting*, Chapter 3, "Estimated Liabilities for Losses and Loss Adjustment Expenses" (by Ruth Salzmann), pp. 29-79 (1974); *see, generally*, Couch, *Insurance* § 21:35; 44 C.J.S. Insurance, § 102; 43 Am.Jur.2d, Insurance § 62.

Reopened claims, which would be encouraged by *Hilyer*, pose particular problems in the workers' compensation insurance field. Strain, *supra*, pp. 33-34. Since premiums will not have been collected for this retroactive adjustment, the reserves and the ultimate payout will come from the carrier's surplus rather than its previously calculated reserves for payment of claims.

The Court of Appeals' decision in *Hilyer* below effects a basic and fundamental change in workers' compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. If left unaltered, it will have an immediate effect not only upon the administration and procedural application of the Act, but on the insurance premiums and benefit costs to industry. This will increase by *at least* the 28% figure represented by the U.S. Chamber of Commerce survey of fringe benefits, and it will probably do so at even a greater rate due to the retroactive applicability and the virtual lack of logical limitation on the Court of Appeals' "value to the employee" approach to average weekly wages.

CONCLUSION

The Court of Appeals decision marks a substantial departure from 55 years of consistent application of the average weekly wage provision of the Act and will have a profound and chaotic effect upon the administration of the Act. The issue cannot await further ripening. A decision by this Court is imperative now.

The Petition for a Writ of Certiorari should be granted.

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APPENDIX A

COM-P-6
X COM-P-6-8
X COM-P-6-8, Sec.2(13)
X COM-P-6-8, Sec.10
X ADM-8-4

U.S. DEPARTMENT OF LABOR
Wage and Labor Standards Administration
Bureau of Employees' Compensation
Washington, D.C. 20211

June 17, 1968

LS/HW PROGRAM MEMORANDUM NO. 32
SUBJECT: Computation of Pay Rates –
Fringe Benefits –
LS/HW Compensation Act - Sections 2 (13) and 10

Quoted below is the Associate Solicitor's advisory opinion of March 18, 1968:

> "You ask whether pensions, dental care, medical care, and other fringe benefit contributions by employers should be included in computing the average weekly wage for computation purposes.
>
> "Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act reads as follows:
>
> > " 'Wages' means that money rate at which the services rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer."

"We feel that it would be improper to assert the inclusion of pension and health plan contributions by the employer

in computing wages though there is support for including such contributions in wages. *United States v. Carter* 353 US 210 (1957) concerned the extent of the liability on a payment bond furnished by a contractor, as required by the Miller Act, for the protection of persons supplying labor for the construction of federal public buildings. The collective bargaining agreement under which the laborers were hired obligated the contractor to pay 7½ cents per hour to the trustees of a health and welfare fund established for the benefit of the laborers. It was expressly stated that the contributions 'shall not constitute or be deemed to be wages' due the employees. The Court stated that 'the parties have stipulated what contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. That the unpaid contributions were a part of the compensation for the work to be done by Carter's employees is emphasized by the fact that their amount was measured by the exact number of hours each employee performed service for Carter. Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective bargaining agreements'.

"In *Inland Steel Co., v. NLRB,* 170 F.2d 247 (1948), it was held that pension payments by the employer were wages as well as 'other conditions of employment' within the meaning of the National Labor Relations Act.

"In Senate Report 963, 88th Cong., Second Sess., regarding amendments to the Davis-Bacon Act, at page 3, it was said that 'regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation'.

"Payments to these funds are not only a substitute for direct wage increases which workers would otherwise have received; but, in addition, these payments are now a very large part of the hourly wage costs for the industry. A

typical Longshore agreement reveals a basic wage of $3.50 per hour, and welfare and pension fund contributions of $.83 per hour.

"In *United States v. Embassy Restaurant*, 359 US 29 (1959), the Supreme Court held that contributions by an employer to a union welfare fund which were required by a collective bargaining agreement were not entitled in bankruptcy to priority as being 'wages . . . due to workmen' under the Bankruptcy Act. The contributions were flat sums of $8 per month for such workmen, without relation to their hours, wages, or productivity. Because they were due to trustees not to workmen, the court ruled that these unpaid contributions were not wages due to workmen. A strong dissent was registered. The Longshore Act does not require that the wages be due to the employee; thus mitigating this case as authority for the present situation.

"However, other factors and policy considerations must lead us to the view that we should not include employer contributions to pension funds and for other fringe benefits in computing the average weekly wage rate.

"In determining the wage paid to employees with regard to the Fair Labor Standards Act, which defines wages as including the reasonable cost to the employer of furnishing the employee with food, lodging or other facilities, reference should be made to the letter from the Administrator of May 22, 1967, which says:

> 'As pointed out in section 531.32; other facilities are used in section 3(m) must be something like board and lodging. Contributions to pension plans or group life, disability, or other insurance plans do not constitute the reasonable cost or fair value of facilities furnished which may be credited under section 3(m) of the act toward the applicable minimum wage which section 6 requires to be paid free and clear on the pay day for each workweek'.

"Note however, that the FLSA requires that the wages be paid 'free and clear,' while the Longshore Act does not contain such an express requirement.

"Before 1964, fringe benefit contributions were not part of wages under the Davis-Bacon Act. Since it was generally felt that such contributions should be part of wages, Congress passed an amendment to the Act including them as such.

"In 1927, when the Longshore Act was enacted, one rarely heard of private welfare and pension funds to provide group life insurance, hospital and medical care, and pensions. These fringe benefits developed during World War II and expanded greatly thereafter. Since we feel bound by past practice of excluding these fringe benefit contributions from wages, it is up to Congress to provide a realistic definition of wages which will correspond to current wage customs and practices".

/s/ _____
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Assistant Director, LS/HW

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